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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 823 - 825

FRED E. HUMMEL, as Trustee in Bankruptcy of the Estate of DOROTHEA W. HUSZAGH,

Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH and FRED J. WEGG as the sole Trustee under the last Will and Testament of FREDERICK H. WICKETT, deceased,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Summary and Short Statement of The Matter Involved.

This case involves an Illinois trust set up by the will of a father for his daughter. The daughter is now bankrupt, and her trustee is petitioner here. Two things are true of a trust such as this in Illinois: (1) it can be conveyed by the beneficiary; (2) it cannot be seized by a judgment

creditor by means of a creditor's bill, because the Chancery Practice laws of Illinois prohibit a creditor's bill against a trust such as the one here involved.

In 1939 James R. Cardwell, a judgment creditor of Dorothea W. Huszagh, filed a Creditor's Bill in the Circuit Court of Lake County, Illinois, and by those proceedings had sold to himself, on a Master in Chancery sale, the interest of Dorothea W. Huszagh in the very sizeable trust left by Frederick H. Wickett (R. 26).

Dorothea W. Huszagh filed voluntary bankruptcy in 1940. Fred E. Hummel, petitioner here, was appointed Trustee in Bankruptcy. Hummel filed a Bill of Review in the Circuit Court of Lake County, Illinois, to set aside and have decreed null and void, the seizure of the trust which Cardwell had made by his Creditor's Bill proceedings. This petition here is a continuation of those Bill of Review proceedings by Hummel as Trustee in Bankruptcy.

The basis of the Bill of Review was that the court, in selling the trust on the Creditor's Bill brought by Cardwell, had committed Error Apparent. There is only one provision as to Creditor's Bills in the Illinois Statutes. It is contained in the chapter on Chancery Practice (Chapter 22) as Section 49. Because of its importance here it is quoted in full:

> "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been

created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not; * * *."

The proceedings on the Cardwell Creditor's Bill had been contrary to that statute, in that the original complaint (R. 5) the answers of both defendants (R. 9, 17) and the decree (R. 17) all showed the trust was created by Frederick H. Wickett for Dorothea W. Huszagh—precisely the type of a trust which the Supreme Court of Illinois said in this case "comes squarely under the provisions of the exception in said Section 49." (R. 129).

(The contention of Hummel that the Illinois Court was without jurisdiction to sell, in the creditor's bill proceedings, Dorothea W. Huszagh's interest in the trust, was supported by both the Appellate Court of Illinois and the Supreme Court of Illinois. Appendix 39. R. 129.)

On the trial of the Bill of Review case, evidence was heard that, after the entry of the decree in the Creditor's Bill case by which Dorothea W. Huszagh lost her trust, counsel for Cardwell and Huszagh agreed that if Cardwell would not take a deficiency against Mrs. Huszagh, no further contest would be made (R. 82). This agreement was held, by the trial court, to create an estoppel barring both Mrs. Huszagh and Fred E. Hummel, her Trustee in Bankruptcy, from setting aside the Creditor's Bill proceedings. So the trial court dismissed Hummel's Bill of Review, and also dismissed a counterclaim by Mrs. Huszagh (R. 66).

(This counterclaim of Mrs. Huszagh had been that she should be substituted as party plaintiff for her trustee in bankruptcy. She claimed a Bill of Review should lie because the trust was a spendthrift trust. Both the Appellate Court and the Supreme Court of Illinois held that as to the Huszagh counterclaim, the estoppel applied. The question of whether the trust was or was not a *spendthrift trust* was *within the jurisdiction of the court* in the earlier Cardwell proceedings, and by her agreement not to appeal from the judgment that it was not a spendthrift trust, she was estopped from complaining again that it was a spendthrift trust. Appendix 30. R. 132.)

The Appellate Court of Illinois affirmed the dismissal of Mrs. Huszagh's counterclaim, but reversed the dismissal of the Hummel Bill of Review (R. 100). That Court held the seizure by Cardwell was void, because contrary to Section 49 of Chapter 22 of the Illinois Statutes, and that the Trustee in Bankruptcy had sufficient interest to maintain the suit. The question of whether the interest in the trust was, or was not, exempt in bankruptcy was left for decision in the bankruptcy courts (Opinion in Appendix).

On appeal to the Supreme Court, that court reversed that portion of the Appellate Court's decision which sustained Hummel's Bill of Review. It affirmed the dismissal of the Huszagh counterclaim (R. 155-158).

The Supreme Court of Illinois said that since Cardwell, a judgment creditor who brought a Creditor's suit, could not have the Huszagh trust, neither could a trustee in bankruptcy. To arrive at that conclusion the Illinois Court analyzed the Federal Bankruptcy Act, and construed that Federal Act as limiting a trustee in bankruptcy, as to property which the trustee must bring a plenary suit to

reach, to the "rights, remedies, and powers of a judgment creditor, *and no more.*" (Italics ours.)

Petition for Rehearing was filed, and denied without opinion (R. 154).

It is to review the construction by the Illinois Court of the Federal Bankruptcy Act, as to the powers of a Trustee in Bankruptcy, that this petition is brought.

Statement of Jurisdictional Grounds.

This cause originated in the Circuit Court of Lake County, Illinois, and was reviewed on appeal by the Appellate Court of Illinois for the Second District, and then reviewed on appeal by the Supreme Court of Illinois. The judgment of the Supreme Court of Illinois finally dismissed all all rights of petitioner here.

The trial court filed a Preliminary (R. 54) and a Final (R. 98) Memorandum of Opinion. The opinion of the Appellate Court is reported in 323 Ill. App. 440, 55 N. E. (2d) 881, and is printed here in the Appendix. The opinion of the Supreme Court of Illinois (R. 125) is reported in 390 Ill. 526, 62 N. E. (2d) 433.

The opinion of the Supreme Court was filed and judgment was entered May 23, 1945 (R. 124) but a petition for rehearing was filed (R. 133) and it was denied and the judgment became final September 13, 1945 (R. 154). This Court, by Mr. Justice Murphy, granted on December 8, 1945 (R. 161) an extension of time within which to file this Petition, extending the time to February 11, 1946.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. Sec. 344 (b)). It is claimed that the decision below:

a. Denied to petitioner, acting as an officer of the Federal Court as Trustee in Bankruptcy, his title,

right and privilege conferred by Section 70 (a) of the Bankruptcy Act (11 U. S. C. Sec. 110 a) which reads as follows:

> "a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy, or of the original petition proposing an arrangement or plan held under this title, except in so far as it is to property which is held to be exempt, to all * * * (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered."

b. Denied to petitioner, acting as an officer of the Federal Court as Trustee in Bankruptcy, his title, right and privilege conferred by Section 70 (a) (6) of the Bankruptcy Act (11 U. S. C. Sec. 110 (a) (6)) which vests in the Trustee in Bankruptcy:

> "(6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property."

The denial to petitioner of the benefits of his title to that which the bankrupt could convey (Section 70a) was accomplished by ruling that the trustee only had those rights as to property in the bankrupt's possession. No such limitation is contained in the statute or in any reported case. The Supreme Court of Illinois allowed to the Trustee in Bankruptcy only those rights given by Section 70 c of the Bankruptcy Act (11 U. S. C. 110 c). Section 70 c of the Bankruptcy Act reads as follows:

> "* * * The trustee, as to all property in the pos-

session or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustees shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such creditor actually exists."

By refusing the Trustee the title granted by 70 a, and allowing him only the title given by 70 c, the Illinois Court denied him an explicit title given him by Federal Statute, and cut down the stature of the officer who alone can implement the broad powers of bankruptcy courts over all of the bankrupt's property, to the stature of a judgment creditor. Stated simply, the bankruptcy courts have the power of a judgment creditor, and no more. To cut down the scope of the bankruptcy administration to the level of the remedies of a judgment creditor must inevitably entail denial of some of the trustee's "title, right, privilege" under the Bankruptcy Act.

Because Cardwell had earlier seized Mrs. Huszagh's interest in the trust, some action to set aside that "unlawful taking" had to be brought. By Section 70 (a)(6) of the Bankruptcy Act (11 U. S. C. 110 (a)(6)) the sole person to start such a proceeding as this Bill of Review (a recognized method in Illinois for setting aside earlier seizures) is the Trustee in Bankruptcy. He is expressly given title to any action which arises out of "the unlawful taking" of the bankrupt's property. Were bankrupt to claim such right of action, a defense could properly be made such suit had to be by her trustee. The Illinois Court conceded the unlawfulness of the taking, but denied the Trustee in Bank-

ruptcy had any interest sufficient to sue. That denied him a right granted by the Bankruptcy Act.

Questions with reference to the right, title and interest of the Trustee under the Federal Statute were raised in Motions to Dismiss and in Answers, in the trial court (R. 35, 37, 56, 38). The trial court's memorandum of opinion ruled the trust was transferable within the meaning of 70 (a) of the Bankruptcy Act and the Trustee was the proper person to sue (R. 55).

In Illinois, the grounds of appeal and questions sought to be raised on review are required to be set forth in briefs, and it is sufficient if the errors relied on for reversals clearly appear from an examination of the entire brief. *Swain* v. *Hoberg*, 380 Ill. 442, 44 N. E. (2d) 38. It is unquestioned that both in the Appellate and Supreme Courts the briefs raised the question of the Trustee in Bankruptcy's title and rights under the Bankruptcy Act.

The Appellate Court sustained the title of the Trustee under the Bankruptcy Act without discussion (Opinion printed as Appendix to this Petition).

The Federal question was the basis of the denial of relief to the Trustee in Bankruptcy in the Supreme Court of Illinois, as appears from the following quotation, which is the entire discussion in the opinion as to the rules applied to the Trustee in Bankruptcy: (R. 130).

> "However, we cannot see that the trustee in bankruptcy is in any better position to reach Mrs. Huszagh's interest in the trust than was Cardwell, the plaintiff in the creditor's suit. The office of trustee in bankruptcy is created by the Bankruptcy Act, and his powers and the remedies he is authorized to pursue in a plenary suit are defined in such act. The appellee relies upon subsection 5 of section 70A of the Bankruptcy Act for his power and authority to reach the trust estate in this action. The said clause vests the

trustee, by operation of law, with the title of the bankrupt, except insofar as it is to property which is held to be exempt, to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered." Under this section, we believe the rights of the trustee in bankruptcy relate only to property which passes to him without the necessity of bringing a plenary suit to recover. It refers to property which was in the possession or control of the bankrupt at the date of the bankruptcy. In section 70C of the same act, with reference to all other property, the trustee in bankruptcy is vested with all the rights, remedies and powers of a judgment creditor, and no more.

If the protection of section 49 of the Chancery Act makes the interest of Dorothea W. Huszagh in the trust immune from any suit or lien by a creditor, surely a trustee in bankruptcy representing a creditor can have no greater or superior right. In the matter of exemptions and the interpretations of property rights, the bankruptcy courts have always regarded decisions of the State courts as controlling. (*Erie* v. *Thompson*, 304 U. S. 64.) In *Johnston* v. *Herrin*, 383 Ill. 598, we held that a contingent interest of a bankrupt is not property which the trustee in bankruptcy can recover in a plenary suit.

The trustee in bankruptcy contends that the amendment to the Bankruptcy Act in 1938 shows that property, even though it may not be subject to seizure, may pass to the trustee if it is transferable. With the exception given to exempt property in section 70A of the act and the power to acquire property through a plenary suit limited to those of a judgment creditor in section 70C, we do not construe the act to give the trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor. Any other rule would be contrary to the plain language of section 70C and permit a trustee to take

property which, under the laws of Illinois, could not be taken by any other plaintiff for the payment of a debt. In *Dunham* v. *Kauffman*, 385 Ill. 79, we held that the interest of a beneficiary in a trust could not be reached by attachment. In *Baumgarden* v. *Reconstruction Finance Corp.*, 131 Fed. 2d 741, the Circuit Court of Appeals held that a trust fund which came squarely under the exception in section 49 of the Chancery Act could not be reached by garnishment. It is clear, from the holdings of this court and that of other judisdictions, that section 49 of the Chancery Act creates a rule of property and does not relate solely to procedure. (*Potter* v. *Couch*, 141 U. S. 296.) The Appellate Court erred in holding that the trustee in bankruptcy had a right to challenge the validity of the sale of the trust estate. The trial court correctly ruled that the bill of review filed by the trustee in bankruptcy should be dismissed for want of equity."

This interpretation of the Federal Statute was questioned and argued in the Petition for Rehearing, which was denied without opinion (R. 133).

Questions Presented.

1. Whether a Trustee in Bankruptcy, as to property not in the possession of the bankrupt, has only the rights of a judgment creditor holding an execution duly returned unsatisfied.

2. Whether a Trustee in Bankruptcy, as to property unlawfully taken from a bankrupt, may bring action to set aside such unlawful taking only if a judgment creditor holding an execution duly returned unsatisfied might bring such an action.

3. Did the Supreme Court of Illinois, by limiting the rights of a Trustee in Bankruptcy as to property not in the possession of the bankrupt to the rights which a judg-

ment creditor holding an execution duly returned unsatisfied might obtain by means of a Creditor's Bill, deny to petitioner the titles, rights, and privileges to bankrupt's property conferred on him by the Bankruptcy Act?

4. Did the Supreme Court of Illinois, by limiting the rights of a Trustee in Bankruptcy to the rights of a State court judgment creditor in a Creditor's Bill proceeding under the statute governing in Illinois as to practice in Creditor's Bill cases, deny to petitioner the title, right, and interest he is given by the Bankruptcy Act to bring action to set aside an unlawful taking of bankrupt's property, where the action brought by the Trustee in Bankruptcy *was not a Creditor's Bill action, but an action to set aside a transfer which was unlawful?*

Reasons for Allowance of the Writ.

1. By the Bankruptcy Act of March 2, 1867, the Act of June 8, 1872, the Act of March 3, 1873, and up to the Act of 1898, nothing came under bankruptcy administration except property which a judgment creditor could take on "levy and sale upon execution or other process or order of any court by the laws of the State—" (Revised Statutes of U. S. Gov. Pr. Office, 1875, Sections 5044, 5045). By the 1898 Act there was introduced for the first time the provision that the Trustee was vested with "property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him." That provision in substance, has continued up to now in section 70a. Under that provision, however, a weakness developed, between 1898 and 1910. The trustee could not himself claim the rights of a judgment creditor. So there were cases where the trustee could not succeed, although a judgment creditor might. This unsatisfactory condition

came to a head in *York Mfg. Co.* v. *Cassell,* 201 U. S. 344. There a lien was, by State law, good against all except judgment creditors, so the trustee was denied the right to invalidate it because none of the bankrupt's many creditors had happened to reduce their claim to judgment. To cure this weakness Congress acted, and by the Amendment of 1910 *added* what was then Section 47A(2) and is now 70C. Since the Amendment of 1910 the trustee has had not only the right by 70A to that which the bankrupt might convey, but *also* the rights of a judgment creditor. In its present ruling that 70C is the *only* right of this petitioner, the Illinois Court ignores the legislative history of the Act, and denies this petitioner the rights of *another* section of the Act. *In re Seward Dredging Co.*, 242 F. 226, 228, cer. den. 245 U. S. 651, states that since the Amendment of 1910 the trustee has two rights:

> "* * * *i.e.*, that of the bankrupt and that of such a creditor as is described (by the Amendment of 1910). They are different rights, sometimes antagonistic; the trustee can take his choice."

In *Myers* v. *Matley,* 318 U. S. 622, this court said at page 627:

> "The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody."

Petitioner claims the decision of the Illinois Court ignores the Statute, its history, and its accepted interpretation. Since the question involves the title of the trustee to property, it involves the most important sections of the bankruptcy act, one of the most vital of all Federal Statutes, and this Court has frequently granted certiorari to pass on bankruptcy act questions, where the questions are important in the administration of the Bankruptcy Act.

Sampsell v. *Imperial Paper Corp.*, 313 U. S. 215, 217; *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, 514.

2. The Illinois Statute on Chancery Practice denies the right to seize by a creditor's bill a trust which has proceeded from a person other than the debtor (Ill. Rev. Statutes, Chap. 22, Sec. 49, *supra*). The ruling of the Supreme Court of Illinois against this petitioner relies on 70C of the Bankruptcy Act, and says: (R. 131).

> "* * * we do not construe the act (Bankruptcy Act) to give the trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor."

If a trustee under an express trust must be sued in a plenary suit, whenever a trustee in bankruptcy seeks the bankrupt beneficiary's interest, as is held in *In re Baudoine*, 105 Fed. 574 and *In re Whitney*, 113 Fed. (2cd) 426, then the rule of the Illinois court makes it impossible for a trustee in bankruptcy to reach any trust in Illinois which was created by any one other than the bankrupt. For he must bring a plenary suit, and under the rule in this suit, he cannot succeed because of the practice provisions on creditor's bills. This is a highly unusual bit of judicial legislation and has the effect of making every trust created by others than the bankrupt a spendthrift trust in Illinois against a trustee in bankruptcy. It is a result, arrived at by a twisted construction of the Bankruptcy Act, doubly surprising by the fact the Supreme Court of Illinois has heretofore allowed a trustee in bankruptcy to take Illinois trusts created by persons other than the bankrupt beneficiary in the following cases: *Crane* v. *Crane*, 341 Ill. 363; *Matthern* v. *Rankin*, 228 Ill. 318; *Martin* v. *McCune*, 318 Ill. 585. None of those cases are cited or distinguished by the Supreme Court of Illinois in its opinion here, though they were argued in full in briefs of this petitioner. The Statute as to creditor's bills in Illinois is over 100 years

old and was, of course, in effect when those cases were decided. Because of the present decision the status of trusts, and whether they are, or are not, possible assets of a bankrupt's estate, is wholly an unpredictable matter in the administration of bankruptcy in Illinois. And this confusion arises not because of any interpretation of the Illinois Chancery statute, but because of the State Court's interpretation of what rights the Federal Bankruptcy Act gives a trustee in bankruptcy.

3. Statutes identical with the Illinois Statute on Chancery Practice are in existence in New Hampshire, New Jersey, Tennessee, and Washington. (Griswold, Spendthrift Trusts, 1936, p. 62.) Those five states now have the same unsettled bankruptcy administration, although no reported case from any of the five states has ever before held a trustee in bankruptcy does not succeed to the bankrupt beneficiary's assignable interest under a trust.

4. The Illinois Statute which prohibits creditor's bills against a trust such as this, does not at all effect the beneficiary's absolute right to assign his interest. *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, 10, ruling on an Illinois trust, and affirming the Illinois Appellate Court in *Blair* v. *Linn*, 274 Ill. App. 23, where the court said the statute:

> "is not designed to protect the trust fund from the voluntary alienation of the *cestui que trust.*"

The Illinois Supreme Court used the same language in *Binns* v. *LaForge*, 191 Ill. 598, 608. Where an interest in a trust is assignable, it passes to the trustee in bankruptcy, this court expressly held in *Hammond* v. *Whittredge*, 204 U. S. 538. Cases holding an interest in a trust passes, if assignable, to a trustee in bankruptcy, even though a judgment creditor could not take the trust are: *Horton* v. *Moore*, (6th) 110 Fed. (2d) 189, 191; *Patrick* v. *Beatty*, 202

N. C. 454, 460, 163 S. E. 572, 575; *Pollock* v. *Meyer Bros. Drug Co.*, (8th) 233 Fed. 861, 869. The effect of the present Illinois decision is to absolutely repeal Section 70a(5) of the Bankruptcy Act, which gives the trustee title to that which is assignable. Compare the Illinois interpretation of the Bankruptcy Act, with what has been the accepted view, well stated at page 869 of *Pollock* v. *Meyer Bros. Drug Co.*, *supra:*

> "The fact whether a fund or any other property of the bankrupt is subject to seizure under execution at the time bankruptcy proceedings are instituted against him is not the test whether the interest of the bankrupt in the fund or property passes to the Trustee. Under Section 70a(5) of the Bankruptcy Act (Comp. Stat. 1913, Sec. 9654), all property, which prior to the filing of the petition he could by any means have transferred, passes to the trustee. * * * There are many interests which, if owned by the bankrupt, may be of value and increase the assets of the estate, and yet not be subject to seizure on execution; but, being transferable, they will pass to the Trustee."

The Federal Courts have uniformly held that the rights of a bankruptcy trustee are *not* limited to "those afforded a judgment creditor", whether or not those rights, are asserted in a "summary" or "plenary" suit.

In *Page* v. *Edmunds*, 187 U. S. 596, the Supreme Court of Pennsylvania had held a stockbrokers seat "could not be seized in execution", yet this court held it passed to a trustee in bankruptcy, saying at page 604:

> "The bankrupt act of 1898 has made its own rule—The trustee of a bankrupt's estate is the bankrupt's assignee, and we only repeat the statute when we say that the trustee is vested with whatever the bankrupt can convey. And the statute is something more than another made of transferring property *in invitum*. It is a gift of privileges and expresses the conditions upon which they are conferred."

The Supreme Court of Illinois has in this case limited the interpretation of 70a(5), which says the trustee takes what bankrupt could assign, to that which a creditor might take. In 1924, this Court in *Board of Trade* v. *Johnson,* 264 U. S. 1 reviews *Page* v. *Edmunds, supra,* and said at page 10:

> "It declined to limit the definition of property under subdivision (5) to such as state courts might hold could be seized in execution by judicial process."

The rule that property passes to a trustee in bankruptcy, although not subject to seizure in state courts, is invariably followed in all of the several Circuit Courts of Appeals where this issue has arisen: First: *Fisher* v. *Cushman,* 103 Fed. 860, 866. Second: *In re Coleman,* 136 Fed. 818, 819; *In re Wright,* 157 Fed. 544, 546. Sixth: *O'dell* v. *Boyden,* 150 Fed. 731; *In re Baxter,* 104 Fed. (2d) 318, 320. Eighth: *In re Orear,* 178 Fed. 632, 635; *Pollock* v. *Meyer Bros. Drug Co.,* 233 Fed. 861, 869; Tenth: *In re Irwin,* 60 Fed. (2d) 495, 497.

The same rule is recognized by the text writers. Remington, Bankruptcy, Section 1192, says:

> "If it was capable either of being transferred or of being levied upon, it will pass".

5. As shown under the previous point it is unquestioned that in Illinois Mrs. Huszagh could assign her interest in the Trust. She could for example, assign it to a bank and get from the bank either a loan or the full value of the Trust. She would thus have in her hands immediately and could spend all of the property which had been placed in trust for her. For hundreds of years creditors have been barred from seizing certain trusts only on the theory that the settlor had created a trust which must be left intact to carry out the plan of settlor to provide a fund to be used through the years for the support of the object of his bounty. Where the settlor allows the trust to be defeated by the

beneficiary by anticipation or assignment of the beneficiary's interest the courts have uniformly refused to protect the trust from creditors.

This Trust contains no spendthrift language, and in Illinois it is the rule that it cannot be a spendthrift trust if there is no restriction on the powers of alienation. *Steib* v. *Whitehead*, 111 Ill. 247; *Blair* v. *Linn*, 274 Ill. App. 23.

And so the Illinois Courts have held that a trust cannot be immune from a beneficiary's creditors if the beneficiary could assign the trust. In *Hopkinson* v. *Swain*, 284 Ill. 11, the Court said on Page 23:

> "There could be no such exemption from liability for debt if the beneficiary could convey or assign the income * * *"

Since it is settled in Illinois that this trust is assignable it is apparent that the decision in this case is contrary to *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427.

Mr. Justice Holmes, speaking for the court, said at page 428:

> "If it be true without qualification that the bankrupt could have assigned her interest and by so doing could have freed from the trust both the fund and any proceeds received by her, the argument would be very strong that the statute intended the fund to pass."

He said that:

> "there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts."

The Supreme Court of Illinois is clearly in the position of saying that any beneficiary under a trust can exercise all the powers of ownership over his share of the trust, but that the property cannot be made subject to the benefici-

ary's debts. The beneficiary could of course anticipate the income or sell the corpus and take the money and pay selected creditors. But this choice is to be the beneficiary's choice. Even if the beneficiary voluntarily invokes bankruptcy and voluntarily seeks the protection of a statute which says there shall go to pay the beneficiary's debts all that the beneficiary might assign, still the Illinois Court says an assignable trust may not be used to pay debts.

It is submitted that the Illinois Supreme Court has raised one of the classic questions of the law: The question of the extent to which one may be permitted to shield property over which he has control, from the payment of his legitimate debts. The answer of the Illinois Court is that such property is shielded from creditors. It arrives at that answer by its construction of the Bankruptcy Act. It is submitted that if the bankruptcy law is to be construed as shielding from creditors property over which the debtor has absolute control, that advance (or retreat) in legal theory is so important in the administration of the bankruptcy law that a failure of this Court to review the decision would amount to an abdication of its powers.

6. The opinion of the Supreme Court of Illinois holds that whenever a trustee in bankruptcy must bring a plenary suit he has only the rights of a judgment creditor. That Court speaks of "the power to acquire property through a plenary suit limited to those of adjudgment creditor in Section 70C", and that Court says "we do not construe the act (bankruptcy act) to give the trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor". (R. 131).

This suit is a bill of review proceeding brought to set aside an unlawful transfer of the bankrupt's property. A suit to recover property wrongfully taken from a debtor is never such a suit as a judgment creditor might bring.

Under the Illinois rule in this case: since a judgment creditor could not bring a plenary suit to recover property unlawfully taken from a debtor then neither could a trustee in bankruptcy ever bring such a suit. By Section 70A(6) of the Bankruptcy Act it is provided that the trustee in bankruptcy shall be vested with:

> "Rights of action arising upon contracts, or usury, or the unlawful taking or injury to his property".

If the Illinois Court's rule as to property not in the bankrupt's possession, and for which a plenary suit must be brought, is correct, then Section 70A(6) of the Bankruptcy Act imposes on the trustee the duty to bring an action *which could never succeed.*

7. If a trustee in bankruptcy can only succeed in a plenary suit brought against a property not in the possession of the bankrupt if a judgment creditor might succeed, then what of the familiar power of the trustee in bankruptcy to avoid preferences made within four months, or in some cases made within one year, of bankruptcy? Such property is always out of the possession of the bankrupt. All state courts recognize preferences as valid against a judgment creditor. This being true, how can a bankruptcy trustee ever set aside a preference, faced with the Illinois Supreme Court rule in this case that as to property not in the bankrupt's possession, the trustee "is vested with all the rights, remedies and powers of a judgment creditor, and *no more.*" (Italics ours.)

8. Bankruptcy legislation has two distinguishing characteristics: (1) the power to bring through the office of the trustee in bankruptcy all of the bankrupt's non-exempt property into a central tribunal for equitable distribution to the creditors; and (2) the power to grant to a debtor a discharge. This petition seeks a writ of certiorari to review a decision which nullifies the above first characteristic, and

makes bankruptcy administration no more effective than ordinary state court creditors proceedings. This petition seeks a review of a decision which runs contrary to the Acts which Congress has passed, and the decisions which the courts have made, all to the effect that there may be administered in bankruptcy property which a judgment creditor might not in seizure proceedings be able to reach. It is respectfully submitted that if the Amendment of 1910 which added what is now Section 70C is to be, after 35 years, realized as a limitation upon the scope of what might be administered in bankruptcy, such a startling realization needs to be forced upon the consciousness of Congress, of the commercial and legal world, and of the Courts, by the Supreme Court of the land. If, however, when Congress passed the Amendment of 1910 it intended to *add* to the powers of the trustee and not *narrow* them back to the limits which existed prior to 1898, then it is obvious that the Supreme Court of Illinois has erroneously interpreted the scope of the trustees' title and a reversal is needed to avoid confusion in the administration of the Bankruptcy Act.

9. There is no state question involved in the decision against this Petitioner. The Illinois Supreme Court ruled against the Bill of Review of the Trustee in Bankruptcy by construing the Bankruptcy Act as giving only the powers to the Trustee in this case a state judgment creditor might have; then held a judgment creditor could not seize this trust; so neither could the trustee.

The portion of the opinion which invokes the state doctrine of estoppel and consent decree, is the portion which passes on the counterclaim of Dorothea W. Huszagh. The counterclaim of Mrs. Huszagh was based on the theory the trust was a spendthrift trust, and that there was error apparent in the creditor's bill proceedings of Cardwell because of the failure of the court in the creditor's bill

proceedings to hold that it was a spendthrift trust. The Supreme Court says in its opinion:

> "The record in the case indicates that the creditor's suit in the trial court was determined on the question of whether or not the Will of Frederick H. Wickett created a spendthrift trust with Dorothea W. Huszagh as a beneficiary."

On the counterclaim of Mrs. Huszagh which raised again the spendthrift trust question, the Illinois Court held that question was within the jurisdiction of the court in the creditor's suit, and by Mrs. Huszagh's later actions, she was estopped to contest again the spendthrift trust question.

The trustee in bankruptcy, however, filed his Bill of Review on the theory that because the decree was contrary to Section 49 of Chapter 22 of the Illinois Statutes, the decree in the creditor's suit was void. Both the Appellate Court (Appendix 39) and the Supreme Court agreed with the trustee in bankruptcy as to the invalidity of the decree against such an attack (Record 130).

The decree being *void* against the trustee in bankruptcy's attack, the doctrines of consent and estoppel do not apply in Illinois. In *Thayer* v. *Village of Downers Grove*, 369 Ill. 334 (cited with approval by both the Appellate and Supreme Courts in this case) the court said:

> "It is a rule well established that a void judgment or decree may be vacated at any time and the doctrines of laches and estoppel do not apply."

The Creditor's suit decree having been entered contrary to the Illinois Statute, then on the Trustee's attack based on the statute, the rule from *Armstrong* v. *Obucino*, 300 Ill. 141, (cited with approval by both the Appellate and Supreme Courts in this case) applies:

> "Where a court, after acquiring jurisdiction, has

> assumed to enter a decree for a sale which goes beyond the limits of the jurisdiction and transgresses the law the decree is void, and the sale based thereon is likewise an absolute nullity. (16 R.C.L. 7.) One of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment."

Such a void judgment cannot be cured by consent. *Mansfield* v. *Mansfield*, 203 Ill. 92, 98. And this is true "even if there is an agreement that a decree shall be executed as entered." *Hotel Building Corp.* v. *Dunlop Hotel Co.*, 350 Ill. 451, 458.

Since in Illinois neither consent nor estoppel protect a decree where an attack is made which shows (as here) a sale contrary to a statute, it is obvious the portion of the Illinois Supreme Court opinion which treats of consent and estoppel applies only to the counterclaim on the non-jurisdictional and non-statutory spendthrift trust question of Mrs. Huszagh. That the Illinois courts did not intend to dispose of the Trustee in Bankruptcy's rights on that non-federal question is made compellingly evident by reading both the Appellate and Supreme Court opinions. Both separate carefully the suit of the Trustee, and the counterclaim of Mrs. Huszagh. Both apply the non-federal questions only to defeat her counterclaim.

It is submitted, therefore, this petitioner was denied relief solely on the interpretation of his rights, titles and duties under the Bankruptcy Act. In fact the Illinois Court opens the portion of the opinion which disposes of this petitioner's case by saying:

> "The office of trustee in bankruptcy is created by the Bankruptcy Act, and his powers and the remedies he is authorized to pursue in a plenary suit are defined in such act."

It ends up by saying:

> "The Appellate Court erred in holding that the

trustee in bankruptcy had a right to challenge the validity of the sale of the trust estate. The trial court correctly ruled that the bill of review filed by the trustee in bankruptcy should be dismissed for want of equity."

Where the decision is solely on Federal questions against the Petitioner, the State Court decides those questions contrary to the rulings of this and the lower Federal Courts, and the question relates to the vital bankruptcy administration question of the title and rights of the trustee, a proper case for review is presented, this court held in *Hammond* v. *Whittredge*, 204 U. S. 538, 547.

Conclusion.

This is a continuation of one suit, the Bill of Review brought by Fred E. Hummel, as Trustee in Bankruptcy. From the decision on that suit by the Appellate Court, three appeals were taken, by the three defendants. These appeals were docketed in the Supreme Court of Illinois as 28301, 28302, 28303. They were there consolidated (R. 105). The Supreme Court of Illinois rendered identical judgments in cases 28301, 28302 and 28303 (R. 155, 157, 158). This Petitioner, in filing this Petition, seeks a review of the decision of the Illinois Supreme Court, which is common to all three docketed appeals there (R. 124). The respondents to this Petition are necessarily the same, whether 28301, 28302 or 28303 are involved. Petitioner seeks a Writ of Certiorari against each judgment as docketed in the Supreme Court of Illinois, and a hearing here, as there, on a consolidated case.

Wherefore, your Petitioner respectfully prays that Writs of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding said Court to certify to this Court the

record in the cases all entitled *"Fred E. Hummel, as Trustee in Bankruptcy of the Estate of Dorothea W. Huszagh,* v. *James R. Cardwell, Dorothea W. Huszagh, and Fred J. Wegg, as the sole Trustee under the Last Will and Testament of Frederick H. Wickett, deceased"* and originally docketed in the Illinois Supreme Court as numbers 28301, 28302, and 28303, and there consolidated, in order that the decision and judgment of said court in cases numbered there 28301, 28302, and 28303 may be reviewed by this Court, the judgments reversed, and that Petitioner may be granted such other and further relief as may seem proper, including, but not limited to a consolidation for hearing and judgment purposes in this Court.

Respectfully submitted,

SIDNEY H. BLOCK,
Attorney for Petitioner.